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last generation vested with the authority to apply old principles in new forms? Nobody has been able to find any definite authority for the *duces tecum* form of *subpœna*; but the judges of 1808 were not moved by such trifling; such a power, they declared, is "essential to the very existence and constitution of a court of common law." The mere phrasing of an auxiliary writ is not to stand in the way of inherent powers. Is there any known precedent of a writ to a court-bailiff ordering him to shut the doors to keep out an excessive throng, or to open the windows to let in fresh air? But no judge ever refrains from such orders because he has never seen such a form. The ordinary *subpœna* for a witness is of no avail when he is in prison; but the judges—somebody, some time, no one knows who or when—varied the form of words and ordered the jailer *habeas corpus ad testificandum*. They did not supinely sit and watch justice defrauded of testimony because the usual piece of parchment did not precisely fit the exigency.'

"We believe that the power to take every adequate means to compel the attendance of witnesses or the production of testimony inhered in the courts of the common law as a part of their necessary powers."

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### MISCELLANY.

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#### **Sterilization of Convicts as Being a Constitutional Punishment.—**

The theory of punishment for crime is that it is to deter other commission of crime. When it amounts to deprivation of life, this is upon the principle that infraction of law has been so grievous that there is a forfeiture of the right to live, and the declared policy of the state to take advantage of it. That same policy declares that other violations may incur a forfeiture of liberty during an entire life or a part thereof, or there may be a forfeiture of property.

In other times, but rarely now, we believe, there was entailed restraint of liberty sufficiently long for the infliction of corporal punishment or the exposure of malefactors to public humiliation and disgrace. These punishments were exemplified by the whipping-post and the stocks. Then again there was the branding on the forehead or other part of the body the ineffaceable sign of conviction of certain offenses. This last, however, has for a long time been deemed barbarous.

Our American constitutions came along and generally forbade cruel and unusual punishment for crime, and we take it that such a prohibition would not be limited merely to what would be deemed "cruel and unusual" at the dates respectively of these constitutions. It rather should be thought to be a guarantee to accommodate itself to future times, and thus its spirit be properly recognized.

Thus, though life imprisonment or for a term of years might, at

the time a constitution was adopted, appear to justify that such imprisonment should be solitary and without any sanitary benefits, yet within the life of that constitution this might seem so abhorrent to the general sentiment of civilization as to make such a punishment "cruel and unusual." This is merely to suppose that the constitution meant that these words have a relative meaning according to surrounding circumstances. When the circumstances change, the relative meaning should conform to the change.

But does this method of reasoning embrace, or lead to, the inference, that asexualization of criminals after conviction is justifiable under the kind of guaranty we have spoken of? The guaranty is plainly in the interest of the victim of justice. It is an exertion of humane power in his behalf. It leaves out of consideration the general effect of punishment as a deterrent. It seems to trench upon the state's police power.

If it does the last, we are carried back to inquire whether punishment represents anything more than the state exercising power over what the criminal convict has forfeited to it. The law, as we have known it, has never adjudged, that there might be lopped off from the human body a leg or an arm or even a finger. It has confined itself to deprivation of life, liberty and property, except as we have above indicated.

In the excepted things, too, except, possibly, the branding, there has never been intended anything in the way of a reflex influence than that from punishment on the sufferer thereof. When he shall have paid the penalty, again he is free.

It may be said this is not true, so far as certain statutory rights are concerned, such as voting, for example. But this is not a real exception, because it does not concern one of the inalienable or more sacred rights. The law that gives it may take it away.

Coming back, then, to the right to liberty, when the law's penalty has been satisfied, and finding, that this has always supposed the un mutilated citizen, then how stands in constitutional aspect the being asexualized by force of statute?

The Supreme Court of Washington has recently held, that a statute which provides that: "Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation," was constitutional under the Washington constitution which merely forbade the infliction of "cruel punishment." *State v. Feilen*, 126 Pac. 75.

We leave out of this discussion the very reprehensible, as it seems to us, feature of the statute, which submits to a judge's discretion the imposing or not of this additional punishment. A legis-

lature ought to declare a fixed policy as to such a thing and not let it depend upon the particular slant of a judge's mind.

But, taking the question by and large, was this a constitutional punishment? We do not think that omitting the words "or unusual" distinguishes the Washington constitution from others. A punishment is "cruel," not because it may be torture, for what may be torture to one may not be more than seriously inconvenient to another and, yet, punishment must be uniform, or generally so. But it is cruel, though it may not be torture, if it is against the canons of what is appropriate or not in accordance with standards that should be observed.

This view the Washington court does not subscribe to. It speaks of the comparative painlessness of the operation of vasectomy, when carefully and skillfully performed, and especially of its being not objectionable in a case, where for the crime of which the defendant stood convicted, the legislature might have prescribed the death penalty.

The argument seems specious, particularly in the case to which it was applied, as life imprisonment had been imposed. In other words, the legislature had done all it could but forfeit the man's life and then the court, in its discretion, takes away a part of his body.

One is somewhat handicapped in arguing the legal question involved in this kind of a case—in such a setting as is presented. If ever there could be justification for such a law it is in applying it to brutes guilty of rape. But the law itself was not framed on the theory of making these afterwards no longer menaces in their persons to society, as is evident from their being joined with habitual criminals. Further, the purpose is to prevent "procreation."

The statute, therefore, supposes that descendants of these criminals may be objectionable—that congenial traits may appear in offspring. To us this argument has never appealed. It partakes of the spirit which would destroy offspring as relentlessly as mothers were said to cast babes into the Ganges, and we sometimes wonder, whether those who urge these things might not better have been disposed of in this way than those of whom they would make victims.

The unfit to contract marriage have come into speculative consideration, and as opposed to its conclusions we think of the nations of hardy people pushing civilization to the fore and carrying triumphant banners to the uttermost confines of the earth, without ever knowing of such theories, much less desorting to the practices they recommend.

But the question recurs, whether, if to prevent procreation is the only purpose of such a statute, a criminal more than another may become subject to its operation. It presents a theory of forfeiture for crime which may be claimed to be cruel and unusual, merely because it mutilates. Anaesthesia has nothing to do with the case.—75 Central Law Journal 309.